Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SHELIA MARIE BROTHERS, INDIVIDUALLY AND AS NEXT FRIEND OF MINOR CHILDREN, BREINT BROTHERS, ROLAND BROTHERS III, AND DANRICA BROTHERS, AND ROLAND J. BROTHERS, SR.,

Petitioners,

v.

JOHNNY KLEVENHAGEN, IN HIS OFFICIAL CAPACITY AS SHERIFF OF HARRIS COUNTY, TEXAS, AND HARRIS COUNTY, TEXAS,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Michael A. Maness
1900 North Loop West
Ste. 500
Houston, Texas 77018
(713) 680-9922

Gerald M. Birnberg
Counsel of Record
For Petitioners
6671 S.W. Frwy, Ste. 303
Houston, Texas 77074
(713) 981-9595

60pp

QUESTIONS PRESENTED

1. Whether the Fourth Amendment condemns a policy authorizing officers to use deadly force to prevent the escape from pretrial custody of a suspect the officers know is unarmed, and do not believe or have reason to believe is dangerous?

2. Whether the Fourteenth Amendment's guarantee of substantive due process condemns a policy authorizing officers to use deadly force to prevent the escape from pretrial custody of a suspect the officers know is unarmed, and do not believe or have reason to believe is dangerous?

LIST OF ALL PARTIES

Petitioners Shelia Marie Brothers, individually and as next friend of her minor children, Breint Brothers, Roland Brothers, III, and Danrica Brothers; and Roland J. Brothers, Sr., were the plaintiffs in the district court and the appellants in the court of appeals.

Respondents Johnny Klevenhagen, in his official capacity as Sheriff of Harris County, Texas, and Harris County, Texas, were defendants in the district court and the appellees in the court of appeals.

Originally, petitioners also named Harris County deputy sheriffs Barry Rizk and Robert Nichols as defendants, but those individuals were dismissed from the suit, on motion of the plaintiffs, before judgment in the district court. They were not involved in the appeal to the Fifth Circuit, and are not parties in this Court.

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OPINIONS BELOW

The district court's unpublished order granting summary judgment to the respondents, and denying petitioners' motion for summary judgment, is reproduced in the appendix at page A-17. The Fifth Circuit's divided opinion, affirming the district court's final judgment in respondents' favor, is reproduced in the appendix at page A-1. *Brothers v. Klevenhagen*, 28 F.3d 452 (5th Cir. 1994).

JURISDICTION

The opinion and the judgment of the court of appeals were entered on August 1, 1994. No rehearing was sought in the court of appeals.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS

U.S. CONST. amend. IV provides, in pertinent part, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

U.S. CONST. amend. XIV § 1 provides, in pertinent part, as follows:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

TEX. PENAL CODE § 9.52 (Vernon 1994) provides, in pertinent part, as follows:

> [A] peace officer is justified in using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

STATEMENT OF THE CASE

Roland Brothers, Jr. was shot and killed by Harris County sheriff's deputies on November 5, 1988.[1] Earlier that day, Brothers was arrested by the Jersey Village police department for auto theft. Because there were outstanding warrants for his arrest, for offenses that did not involve violence or weapons of any kind, the Jersey Village police turned Brothers over to Harris County deputy sheriffs Rizk and Nichols to transport to the Harris County jail in Houston. Twice before, Brothers had escaped from the custody of Harris County deputies, while awaiting trial for non-violent offenses. Knowing that history, the deputies handcuffed Brothers and restrained his legs when they placed him in the back seat of the patrol car.

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[1] Harris County officials knew Brothers only by the alias "Michael Reed." For this reason, various records in the case refer to Brothers as "Michael Reed."

Arriving in the sally port area behind the jail,[2] the deputies left the car to check in their weapons, because officers are not permitted to carry guns inside the jail. Brothers began running from the car, having somehow removed his leg restraints and handcuffs. Fearing that Brothers would escape, the deputies drew their guns and fired twelve shots as he slid under the sally port door. At least three of the bullets struck Brothers, killing him.

Rizk and Nichols subsequently admitted in depositions that they knew Brothers was unarmed, did not believe him to be a danger either to themselves or to anyone in the vicinity, and possessed no knowledge of any prior charge against Brothers involving any form of violence or use of weapons. They shot him solely to prevent his imminent escape.

The deputies' use of deadly force was explicitly authorized by the official policy of Harris County, as promulgated by its Sheriff. That policy authorizes any peace officer to use deadly force to prevent the escape of a person from jail "or other institution for the detention of persons charged with or convicted of a crime," irrespective of whether the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. Deputies Rizk and Nichols were trained to use any force, including deadly force, necessary to prevent any escape, whether or not they believed the person to be dangerous.

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[2] The sally port is a secure, enclosed area at the rear of the jail, in which incoming prisoners are unloaded and escorted into the building for booking.

Petitioners, members of Brothers' family, filed suit in a state district court, alleging that the use of deadly force solely to prevent Brothers' escape constituted an unreasonable seizure, violative of the Fourth and Fourteenth Amendments to the Constitution of the United States.[3] Because Brothers' death resulted directly from the official policy of Harris County, as implemented by its sheriff, petitioners claimed that the county and the sheriff, in his official capacity, were liable for the constitutional deprivations.

Respondents removed the case to the federal court.[4] Ultimately the parties filed cross-motions for summary judgment. The district court granted the motion of the defendants and denied that of the plaintiffs in an unpublished written opinion. The court concluded that the use of deadly force was constitutionally reasonable, since it was necessary to prevent Brothers' escape, and that *Tennessee v. Garner*, 471 U.S. 1 (1985) did not control this case because, unlike

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[3] Petitioners also alleged that Harris County's failure to train its armed deputies in the constitutional use of deadly force deprived Brothers of rights secured by the Fourth and Fourteenth Amendments. *City of Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989). Because the Fifth Circuit concluded that the use of deadly force is invariably permissible to prevent escape from custody, it did not reach this aspect of the case. Petitioners believe the issue is implicitly raised in the questions presented.

[4] Originally, Deputies Rizk and Nichols were named as defendants. They were dismissed from the suit on motion of the plaintiffs, after they testified by deposition that they were merely following the official policy of Harris County, in accordance with the training they had received. When they shot Brothers to prevent his escape, they knew he was unarmed, and did not believe him to be dangerous.

Garner, "Brothers was not fleeing to avoid custody at the time he was shot. Brothers was already in custody." *Brothers v. Klevenhagen*, No. H-90-3783, Order at 7 (S.D. Tex. Apr. 23, 1993).

A divided panel of the Fifth Circuit affirmed, but on a different basis.[5] *Brothers v. Klevenhagen*, 28 F.3d 452 (5th Cir. 1994). The majority held that the shooting of an individual who has already been arrested is not a "seizure," because the person is already "in custody," and therefore cannot be "seized" in the constitutional sense. 28 F.3d at 456. Without citation of authority, the majority mistakenly asserted that this Court has "refused to apply the Fourth Amendment to protect inmates after incarceration," 28 F.3d at 456, and therefore must have intended to imply that no such application is ever possible.[6] Finally, since the Supreme Court upheld body-cavity searches of pretrial detainees in *Bell v. Wolfish*, 441 U.S. 520 (1979), the majority believed the Fourth Amendment can have no application, once the incidents of arrest have been completed, and law enforcement officers have placed an individual in custody.

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[5] "[T]he district court incorrectly applied a Fourth Amendment analysis. Nevertheless, we may affirm summary judgment on grounds different from those stated by the district court [citation omitted]." 28 F.3d at 457 n. 7.

[6] This Court has held that the Fourth Amendment protects pretrial detainees. *See, e.g., County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (applying Fourth Amendment to shield inmates from continued incarceration after 48 hours of detention without probable cause determinations); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (Fourth Amendment gives person arrested without warrant right to timely probable cause hearing).

Citing *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989), the majority concluded that the Supreme Court has not yet decided whether *Tennessee v. Garner*, 471 U.S. 1 (1985) applies after an arrest has been completed and the suspect is in custody. In the Fifth Circuit, however, *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2998, 125 L.Ed.2d 691 (1993), holds that substantive due process analysis, rather than Fourth Amendment jurisprudence, controls disposition of cases involving allegations of unconstitutional use of force against pretrial detainees, once the incidents of arrest have been completed.

Evaluating the Harris County policy under principles of substantive due process, the majority concluded that Harris County's policy was intended only to achieve the legitimate purpose of preventing escapes, that it was not designed "maliciously or sadistically for the very purpose of causing harm," and that the policy was constitutional. The Court conceded that petitioners' Fourth Amendment argument "would be persuasive had Brothers been a suspect [rather than a person who was already in custody at the time of an attempted escape]." *Brothers*, 28 F.3d at 455.

Judge Stewart dissented. 28 F.3d at 458. In his view, *Albright v. Oliver*, 510 U.S. ___, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994), established that the Fourth Amendment does apply to post-arrest pretrial deprivations of liberty, since "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." 28 F.3d at 459, *quoting* 510 U.S. at ___, 114 S. Ct. at 813,

127 L.Ed.2d at 124.[7] The dissent argued that *Tennessee v. Garner* invalidates the Harris County policy, because authorizing the use of deadly force to prevent the escape of all persons fleeing from custody, regardless of circumstances, and despite any reason to believe that an individual poses an immediate threat to officers or others, violates the Fourth Amendment's objective reasonableness requirement. 28 F.3d at 459.

REASONS FOR GRANTING THE PETITION

This case squarely presents the unresolved question whether the Fourth Amendment prohibits the use of deadly force to prevent the escape of a suspect who has been arrested and taken into custody, when the officers know the

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[7] The majority dismissed *Albright* because the main opinion "did not receive the support of a majority of the Justices." *Brothers*, 28 F.3d at 456 n. 3. As Judge Stewart points out, Justice Souter's concurring opinion acknowledged the applicability of the Fourth Amendment in post-arrest situations. 510 U.S. at ___, 114 S. Ct. at 821-22, 127 L.Ed.2d at 132. Thus, five justices concurred in the conclusion that the Fourth Amendment is the proper basis for decision in cases alleging improper post-arrest pretrial seizures.

When a case is decided by a fragmented Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . " *Nichols v. United States*, 511 U.S. ___, ___, 114 S. Ct. 1921, 1926, 128 L.Ed.2d 745, 750 (1994), *quoting Marks v. United States*, 430 U.S. 188, 193 (1977). Since five Members of the Court in *Albright* believed that Fourth Amendment analysis applies to claims of post-arrest pretrial deprivations of liberty, that decision has precedential value.

suspect is unarmed, and neither believe nor have reason to believe the individual poses a danger to the safety of anyone. In *Tennessee v. Garner*, 471 U.S. 1, 11 (1984) the Court held that "a police officer may not seize an unarmed, non-dangerous *suspect* by shooting him dead" (emphasis added). The Fourth Amendment principles applicable to suspects attempting to avoid apprehension should govern attempts to escape from custody after arrest. Suspects killed while attempting to escape custody are in no different constitutional position than suspects killed while fleeing to avoid custody. Neither the district court nor the court of appeals attempted to explain why they should be treated differently.

The Fifth Circuit's decision is fundamentally at odds with this Court's rejection of substantive due process analysis, in favor of examination of the "textual source" of the constitutional protection claimed, *see, e.g., Albright v. Oliver*, 510 U.S. ___, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994) and is irreconcilable with the principles articulated in *Tennessee v. Garner, supra*. The circuits are split on the issue,[8] and the matter is one of life-and-death, recurring

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[8] Compare *Brothers* and *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) with *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 (11th Cir. 1985) (approving *Ayler v. Hopper*, 532 F. Supp. 198 (N.D. Ala. 1981)); *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991); *Frohmader v. Wayne*, 958 F.2d 1024 (10th Cir. 1992); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989); *Calamia v. City of New York*, 879 F.2d 1025, 1034-35 (2d Cir. 1989); *Hammer v. Gross*, 884 F.2d 1220 (9th Cir. 1989), *vacated en banc on other grounds*, 932 F.2d 842 (1991); and *Henry v. Perry*, 866 F.2d 657 (3d Cir. 1989).

import. The Court should grant certiorari to consider and resolve these substantial questions.

a. As To The First Question Presented: The Fourth Amendment Issue

1. The Fifth Circuit has decided an important question of constitutional law that has not been, but should be, settled by this Court.

If Brothers had been killed a few hours earlier, running away from officers trying to arrest him, that use of deadly force would have violated the Fourth Amendment. In *Tennessee v. Garner*, 471 U.S. 1, 11 (1984) this Court held that "a police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." Deadly force may not constitutionally be used to prevent the escape of an apparently unarmed suspected felon, unless it is necessary to prevent the escape, and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Id.* Apprehension by the use of deadly force is a "seizure," subject to the reasonableness requirements of the Fourth Amendment. 471 U.S. at 7.

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does

> not justify the use of deadly force to do so
> . . . .

471 U.S. at 11. Use of deadly force to prevent an escape would be constitutionally justifiable, the Court ruled, "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Otherwise, it violates the Constitution's prohibition against "unreasonable seizures." *Id.*

The Fifth Circuit distinguished *Tennessee v. Garner*, because the attempted escape in this case, unlike that in *Garner*, occurred after the prisoner had been taken into custody. The panel majority believed that *Garner* did not apply, because this Court expressly recognized in *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989) that its "cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins . . ." This case squarely presents that issue.

The Fifth Circuit is not the only court to observe that this issue is open and, as yet, unresolved by this Court. For example, in *Wright v. Whiddon*, 951 F.2d 297, 300 (11th Cir. 1992), the Eleventh Circuit suggested that, "[w]ere the Supreme Court to decide the issue, it might decide that once a pretrial detainee begins to attempt escape, the detainee is analogous to a fleeing suspect and thus is protected by the Fourth Amendment. . . . Conversely, the Court might hold that once a suspect becomes a pretrial detainee the appropriate analysis is under the Due Process Clause. . ."[9]

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[9] *See also, Vineyard v. County of Murray*, 990 F.2d 1207, 1211 (11th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993); *Hammer v. Gross*, 932 F.2d 842, 845 n. 1

Albright v. Oliver, 510 U.S. ___, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) should have eliminated much of the doubt that might previously have existed concerning the applicability of the Fourth Amendment to claims by pretrial detainees. Instead, the Fifth Circuit majority dismissed *Albright* as a plurality decision, as far as its discussion of the Fourth Amendment is concerned, and never mentioned *McLaughlin* at all.

Other courts likewise continue to evaluate post-arrest excessive force claims under substantive due process concepts and to declare the issue still unresolved by this Court. *See, e.g., Bieros v. Nicola*, ___ F. Supp. ___ (E.D. Pa. 1994) [No. Civ. A. 93-CV-4485, Aug. 18, 1994, 1994 WL 447411] (expressly declining to "construe *Albright* as finally determining that persons subject to excessive force after the arrest should bring claims under the Fourth and not the Fourteenth Amendment"); *Fagan v. Vineland*, 22 F.3d 1296, 1305 n. 5 (3d Cir. 1994) (*en banc*); *Newsome v. Webster*, 843 F. Supp. 1460, 1466 (S.D. Ga. 1994) (still declaring "[t]he law is unsettled whether a pretrial detainee's claim of excessive force is properly analyzed under the Fourth Amendment's 'reasonableness' standard," even after *Albright*). *Brothers* thus is not the only post-*Albright* decision to disregard or reject the approach suggested by that case.

Brothers is not even aberrational within the Fifth Circuit. To the contrary, that court had used the same constitutional "lens" (*see, Albright, supra*, 510 U.S. at ___,

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(9th Cir. 1991) ("it may be questioned whether the Fourth Amendment still controls when the seizure or arrest ripens into custody"); *United States v. Cobb*, 905 F.2d 784, 788 n. 7 (4th Cir. 1990); *Austin v. Hamilton*, 945 F.2d 1155, 1159 (10th Cir. 1991); *Stewart v. Roe*, 776 F. Supp. 1304, 1306 (N.D. Ill. 1991).

114 S. Ct. at 814, 127 L.Ed.2d at 125 (Ginsburg, J., concurring)) in evaluating post-arrest excessive force claims in *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993); *Bender v. Brumley*, 1 F.3d 271 (5th Cir. 1993) (applying due process clause analysis to pretrial detainee taken from his cell and allegedly beaten on the day of his arrest); and *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993).

Thus, the case presents an important and recurring question of constitutional jurisprudence, which the lower courts believe is still unsettled by this Court. It should now be finally and definitively resolved.

2. The circuits are split on the question whether the Fourth Amendment applies in evaluating post-arrest excessive force claims.

The Fifth Circuit's ruling in *Brothers* is directly contrary to the Eleventh Circuit's decision in *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 (11th Cir. 1985). Although *Pruitt* itself involved the use of deadly force to stop a suspect from fleeing from an alleged burglary scene, rather than the escape from custody of a suspect previously arrested, that opinion explicitly approved *Ayler v. Hopper*, 532 F. Supp. 198 (N.D. Ala. 1981). In *Ayler*, the district court declared unconstitutional an Alabama statute which purported to authorize use of deadly force by a peace officer who "reasonably believes it necessary to prevent what he reasonably believes to be an escape [from custody] of a person accused or convicted of a felony . . ." Ala. Code § 13A-3-27 (Supp. 1980). The court observed:

> It is clear to the Court that the use of deadly force by a prison official to stop an escaping

> felon is constitutionally tortious unless the official has good reason to believe that the use of such force is necessary to prevent imminent, or at least a substantial likelihood of, death or great bodily harm.
>
> To the extent that [the Alabama statute] purports to authorize the use of deadly force in situations where the use of such force is not necessary to prevent imminent, or at least a substantial likelihood of, death or bodily harm — as the statute certainly appears to do — it is unconstitutional.

532 F. Supp. at 201.

Other circuits have utilized Fourth Amendment analysis in evaluating excessive force claims after an arrest has been completed, and the person has been taken into custody.[10] Other circuits also dispute the Fifth Circuit's

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[10] *See, e.g., Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991) (Fourth Amendment standard applies to claims involving post-arrest excessive force, at least until probable cause hearing conducted); *Frohmader v. Wayne*, 958 F.2d 1024 (10th Cir. 1992) (applying objective reasonableness Fourth Amendment analysis to an excessive force claim, involving allegations that inmate beaten while being placed in holding cell after arrest and booking); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) ("Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested was arraigned or formally charged . . ."); *Calamia v. City of New York*, 879 F.2d 1025, 1034-35 (2d Cir. 1989); *Hammer v. Gross*, 884 F.2d 1200 (9th Cir. 1989), *vacated en banc on other grounds*, 932 F.2d 842, 845 n. 1 and 850-51 (1991) (but noting agreement with panel opinion's reliance on Fourth Amendment analysis in case involving claims arising from use of excessive force to compel a drunk

holding that Fourth Amendment protection ends once an arrest is completed and a suspect becomes a detainee and that it never comes back into play until the person is released from custody. 28 F.3d at 456-57.[11] On the other hand, the Seventh Circuit apparently shares the Fifth Circuit's view that the correct analytical framework for post-arrest excessive force cases is substantive due process. *Wilkins v. May*, 872 F.2d 190, 192-95 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990) (holding that Fourth Amendment protection ceases and substantive due process controls upon completion of an initial seizure).

Thus, the question of whether Fourth Amendment or substantive due process principles should govern determination of post-arrest excessive force claims — or even whether the Fourth Amendment continues to have any force or effect after an arrest has been completed — is one which has divided the Courts of Appeals. That conflict should be resolved by this Court.

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driving arrestee to submit to a blood alcohol test, after he had been arrested and transported to hospital); *Henry v. Perry*, 866 F.2d 657 (3d Cir. 1989) (applying *Tennessee v. Garner* Fourth Amendment analysis where inmate shot while escaping from prison).

[11] *See, e.g., Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) (finding prisoner possesses Fourth Amendment privacy rights despite status as inmate); *Kent v. Johnson*, 821 F.2d 1220, 1226-1227 (6th Cir. 1987) (same); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981); *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

3. The Fifth Circuit's ruling on the Fourth Amendment issue conflicts with decisions of this Court.

(i) The "Textual Source" of the Constitutional Protection

On at least two recent occasions, this Court has emphasized that the starting point in analyzing claims of excessive force brought under 42 U.S.C. § 1983 is "identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 395 (1989). *See also*, *Albright v. Oliver*, 510 U.S. ___, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994). "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process', must be the guide for analyzing these claims'." *Albright, supra*, 510 U.S. at ___, 114 S. Ct. at 813, 127 L.Ed.2d at 123, *quoting Graham, supra*, 490 U.S. at 395.[12]

Notwithstanding that explicit directive, the Fifth Circuit persisted in concluding that the amorphous contours of "substantive due process," rather than the specific prohibitions of the Fourth Amendment forbidding unreasonable seizures, control disposition of this case. That holding cannot be reconciled with the mandates of *Albright*

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[12] This does not mean, of course, that only one constitutional provision applies in any given situation. On the contrary, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. ___, ___, 113 S. Ct. 538, 548, 121 L.Ed.2d 450, 464 (1992); *United States v. James Daniel Good Real Property*, 510 U.S. ___, ___, 114 S.Ct. 492, 499, 126 L.Ed.2d 490, 500 (1994).

and *Graham*, demanding that "the validity of the claim . . . be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized . . . standard [such as substantive due process]." *Graham*, 490 U.S. at 395.

(ii) A Shooting is a "Seizure"

The Fourth Amendment condemns "unreasonable . . . seizures." Nevertheless, the Fifth Circuit concluded that "the text of the Fourth Amendment — prohibiting unreasonable 'seizures' — does not support its application to a post-arrest encounter." *Brothers*, 28 F.3d at 456. The panel majority specifically rejected the proposition that the reapprehension of a suspect attempting to escape from custody is a "seizure" in the Fourth Amendment sense. *Brothers*, 28 F.3d at 456-57.[13]

This Court's cases have never even hinted, much less held, that conduct constituting a pre-arrest "seizure" is somehow not a "seizure" if committed after the arrest. To the contrary, in *Tennessee v. Garner*, 471 U.S. 1, 7 (1984), the Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment," and that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." Although *Garner* is a pre-arrest case, the Court

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[13] In a footnote, the Fifth Circuit acknowledged that shooting an escapee is, literally, a "seizure," but never actually explained why it is not the kind of "seizure" to which the Fourth Amendment applies. 28 F.3d at 456 n. 4. "The concept of 'seizure' in the Fourth Amendment is not so capacious or elastic as to cover pretrial detention . . . after the initial arrest. . . ." 28 F.3d at 456, *quoting Valencia*, 981 F.2d. at 1444.

did not purport to limit that broad explanation of what constitutes a "seizure" solely to pre-custodial situations.

Similarly, in *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989), the Court concluded that a seizure within the meaning of the Fourth Amendment occurs whenever "there is a governmental termination of freedom of movement through means intentionally applied." Any "intentional acquisition of control" over a person is a Fourth Amendment "seizure," *id.*, and if "a person [is] stopped by the very instrumentality set in motion or put in place to accomplish that result," a "seizure" has occurred, triggering Fourth Amendment objective reasonableness requirements. 489 U.S. at 599. Certainly, that description encompasses the shooting of a fleeing escapee, regardless of whether that event occurs before the arrest or during a period of pretrial custodial detention.

The idea that a seizure is not a Fourth Amendment seizure if it occurs after arrest was repudiated by *County of Riverside v. McLaughlin*, 500 U.S. 49 (1991) and *Gerstein v. Pugh*, 420 U.S. 103 (1975), as well as by a majority of Justices in *Albright v. Oliver*. All of those cases characterize post-arrest, pretrial detention as a "seizure" within the meaning of the Fourth Amendment. Thus, this Court's precedents are directly contrary to the Fifth Circuit's holding that the fatal shooting of an escaping detainee is not a "seizure" subject to Fourth Amendment analysis.

(iii) The Fourth Amendment Provides Post-Arrest Protection For Pretrial Detainees

The central thesis of the Fifth Circuit majority's decision is that, once the incidents of arrest have been completed, "the protection of the Fourth Amendment ends."

Brothers, 28 F.3d at 456. From that perspective, the Fourth Amendment applies "to the actual incident of arrest." *Id.*

That holding is directly contrary to several rulings of this Court. *County of Riverside v. McLaughlin,* 500 U.S. 49 (1991), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), both characterize periods of post-arrest pretrial detention as continuing "seizures," subject to Fourth Amendment analysis, as do the opinions of a majority of the Justices in *Albright v. Oliver*. In *United States v. James Daniel Good Property*, 510 U.S. ___, ___, 114 S. Ct. 492, 499, 126 L.Ed.2d 490, 501 (1994), this Court characterized the "detention of criminal suspects" as an activity "governed by the provisions of the Fourth Amendment without reference to other constitutional guarantees," such as, for example, substantive due process. The Fourth Amendment was "explicitly tailored for the criminal justice system," and that amendment "has been thought to define the 'process that is due' for seizures of persons or property in criminal cases." *Id.*, *quoting Gerstein*, 420 U.S. at 125 n. 27.[14]

Contrary to the Fifth Circuit's suggestion, 28 F.3d at 457 n. 6, *Hudson v. Palmer*, 468 U.S. 517 (1983) does not intimate otherwise. In *Hudson*, this Court ruled only that a prisoner possesses no legitimate expectation of privacy in a

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[14] The Fifth Circuit also ignored *Justice v. Dennis*, 490 U.S. 1087 (1989). In that case, the plaintiff had been manhandled by police officers after his appearance before the magistrate and while he was in the booking area awaiting processing into the jail. The court of appeals approved the trial court's evaluation of the case utilizing substantive due process standards, *Justice v. Dennis*, 834 F.2d 380 (4th Cir. 1987), but this Court vacated and remanded "for further consideration in light of *Graham v. Connor*," applying Fourth Amendment standards in evaluating the arresting officers' use of force against a prisoner.

prison cell, sufficient to trigger Fourth Amendment protection against unreasonable searches. 468 U.S. at 526. The Fourth Amendment guarantee against unreasonable seizures protects interests distinct from those implicated in search and privacy cases. Accordingly, even a suspect in custody has a constitutional right to be free from unreasonable seizures, apart from whatever privacy interests that person may have.

b. As To The Second Question Presented: The Substantive Due Process Issue

1. The Fifth Circuit has decided an important question of constitutional law that has not been, but should be, settled by this Court.

In concluding that Fourteenth Amendment substantive due process is not offended by the use of lethal force to prevent the escape from pretrial custody of even non-dangerous suspects, the Fifth Circuit employed an analysis derived from *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) and *Whitley v. Albers*, 475 U.S. 312 (1986), both involving Eighth Amendment claims by convicted felons. The two-pronged test derived from these cases by the Fifth Circuit is that a policy does not violate Fourteenth Amendment substantive due process so long as (1) it is designed "in a good faith effort to maintain or restore discipline" in a jail and (2) it is not invoked "maliciously and sadistically for the very purpose of causing harm," 28 F.3d at 457 (quoting from, but without citation to, *Hudson v. McMillian*, 503 U.S. at ___, 112 S. Ct. at 998, 117 L.Ed.2d at 165 and *Whitley v. Albers*, 475 U.S. at 320-321).

Unlike the inmates in *Hudson* and *Whitley*, Brothers was a pretrial detainee. In *Whitley*, the Court expressly stated that its ruling did not purport to establish the constitutional

standard where pretrial detainees are involved.[15] Nevertheless, although this Court has never so held, the Fifth Circuit has ruled, in effect, that a policy which would pass constitutional muster under the Eighth Amendment if applied to convicted persons, is necessarily constitutional under the due process clause when applied to a pretrial detainee.

By equating Fourteenth Amendment substantive due process with Eighth Amendment standards, the Fifth Circuit has eliminated any evaluation of reasonableness from the constitutional calculus, and has substituted ascertainment of subjective intent. That result validates a policy authorizing use of lethal force, in circumstances where the death penalty could not constitutionally be imposed, even if the crime of escape from custody were successfully completed. Moreover, that result approves a procedure that gives no consideration to the perceived dangerousness of the individual before that person is killed. Indeed, that result sanctions use of deadly force, even when the individual is not believed to be dangerous at all.

Admittedly, "[a]ny protection that 'substantive due process' affords convicted prisoners against excessive force is, . . ., at best redundant of that provided by the Eighth Amendment." *Graham v. Connor*, 490 U.S. at 395 n. 10. But the Eighth Amendment does not determine the limits of constitutional protection afforded a pretrial detainee by the Fourteenth Amendment's due process clause. "[A]part from

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[15] "Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the prison security context by holding, as we do, that in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause." *Whitley v. Albers*, 475 U.S. at 327.

the protection against cruel and unusual punishment provided by the Eighth Amendment, [citation omitted], the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, see *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16, 545, 99 S. Ct. 1861, 1872 n. 16, 1877, 60 L.Ed.2d 447 (1979), . . . and for persons under arrest, see *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-245, 103 S. Ct. 2979, 2983-2984, 77 L.Ed.2d 605 (1983)." *Collins v. City of Harker Heights*, 503 U.S. ___, ___, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261, 274 (1992).

If a particular practice violates the cruel and unusual punishment clause of the Eighth Amendment, it would necessarily be contrary to substantive due process principles, because the Eighth Amendment proscribes cruel and unusual punishment, while the due process clause prohibits any punishment of a pretrial detainee, "cruel and unusual," or otherwise. *Bell v. Wolfish*, 441 U.S. at 534-535; *Ingraham v. Wright*, 430 U.S. 651, 671-672 n. 40 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167 (1963). The Fifth Circuit concluded that since the shooting of an unarmed, non-dangerous convicted felon to prevent escape would not violate the Eighth Amendment, so long as the use of lethal force was not sadistically or maliciously motivated, such force would necessarily be constitutionally acceptable in a pretrial detention context as well.

This Court's cases provide no support for that novel conclusion. Accordingly, the Court should grant certiorari to decide whether the rights of pretrial detainees under the Fourteenth Amendment's due process clause are co-extensive with or greater than the protections provided by the Eighth Amendment to convicted prisoners.

2. The standard applied by the Fifth Circuit conflicts with decisions of this Court.

Even if Eighth Amendment analysis controls the scope of Fourteenth Amendment substantive due process, the two-prong test utilized by the Fifth Circuit is contrary to applicable decisions of this Court, establishing a more refined evaluative standard.

Whitley v. Albers, 475 U.S. 312, 321 (1986) identifies five factors which must be weighed in appraising the constitutionality of a particular use of force under Eighth Amendment standards: (a) the extent of injury inflicted; (b) the need for the application of force; (c) the relationship between the need and the amount of force that was used; (d) the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; and (e) any efforts made to temper the severity of a forceful response. *See also, Hudson v. McMillian*, 503 U.S. ___, ___, 112 S.Ct. 995, 999, 117 L.Ed.2d 156, 166 (1992).

The Fifth Circuit ignored factors (a) and (d). Although death is the most severe injury possible, the court did not even mention the extremity of the injury in assessing its constitutionality. The officers who killed Brothers did not perceive any threat to their safety, or that of others, at the time they shot him. Indeed, the Harris County policy requires no perception of dangerousness at all.

As to the alleged need to use lethal force, and the relationship between that need and the amount of force used, the Fifth Circuit was satisfied that, since lethal force was necessary to prevent an escape, it was necessarily constitutional, without any need to weigh the relative importance of the necessity to prevent escape against the

interest of the deceased in life. *Cf. Tennessee v. Garner*, 471 U.S. at 11 ("[i]t is not better that all felony suspects die than that they escape").

Concerning the last factor, the Harris County policy actually prohibits officers from firing warning shots, prior to using deadly force against a fleeing suspect. There is no requirement under the policy that the officers seek to stop the subject with oral commands prior to employing deadly means, although the officers did so in this case. Finally, there is no requirement that the officers give chase, or otherwise make any efforts whatever to apprehend a fleeing suspect, before resorting to lethal force.

In its evaluation of the Harris County policy, the Fifth Circuit never adverted to or discussed any of these matters, identified in *Whitley* and *Hudson* as crucial to a determination of the constitutionality of a particular use of force in the Eighth Amendment context. Instead, that court relied exclusively on the absence of malevolent intent and the alleged presence of a legitimate disciplinary purpose as dispositive of the question of constitutionality.

That unprecedented narrowing of the scope of Eighth Amendment review is of crucial significance. It results in upholding a policy that authorizes unrestricted use of lethal force, without assessment of the dangerousness of the particular individual against whom it is employed. A policy that allows death to be inflicted upon a person, without assessing the dangerousness of the individual against whom it is used, is arbitrary and capricious in the extreme. Such a policy is the antithesis of due process, regardless of whether motivated by sadism or malice.

This Court's Eighth Amendment cases directly contradict the holding of the Fifth Circuit's majority. In

Helling v. McKinney, 509 U.S. ___, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), for example, the Court ruled that exposing a convicted inmate to conditions that threaten serious health problems can constitute a violation of the Eighth Amendment. The Court never intimated that a constitutional infraction could be found *only* if the prison officials were acting "maliciously and sadistically for the very purpose of causing harm" in failing to protect inmates from exposure to environmental tobacco smoke.

Similarly, in *Farmer v. Brennan*, 511 U.S. ___, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), the Court reaffirmed that prison officials transgress the Eighth Amendment when they act with "deliberate indifference" to the health or safety needs of inmates, and expressly disavowed a "malicious or sadistic" intent element in that kind of Eighth Amendment case. While the Court did note in *Farmer* that malicious and sadistic purpose are required to establish an Eighth Amendment violation "in one class of prison cases: when 'officials stand accused of using excessive physical force'." 511 U.S. ___, 114 S.Ct. 1978, 128 L.Ed.2d at 824 (citing *Hudson v. McMillian*, 503 U.S. at ___, 112 S.Ct. at 996, 117 L.Ed.2d at 165; and *Whitley v. Albers*, 475 U.S. at 320), the Court was referring to the mental state of a particular official suddenly confronted with a dangerous situation involving immediate and actual risks to safety, rather than a formal or official policy promulgated after deliberative processes to be applicable in all circumstances. The emergency rationale underlying the *Whitley mens rea* standard does not apply to such a calculated decision. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991) (explaining emergency doctrine rationale of *Whitley* and adopting "deliberate indifference" standard, rather than malicious and sadistic intent to cause harm analysis, in Eighth Amendment prison cases).

Under Harris County's official sponsorship, two deputy sheriffs imposed the death penalty on an unarmed suspect in their custody, not yet convicted of any crime, simply because he tried to run away. The Fifth Circuit found that result violated no federal constitutional right, only because the county policy was not "maliciously or sadistically" inspired. This Court should grant certiorari to correct that mistaken decision, which is directly in conflict with applicable Supreme Court precedent. Sup. Ct. R. 10.1(c).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Gerald M. Birnberg
Counsel of Record
for Petitioners
6671 Southwest Freeway
Suite 303
Houston, Texas 77074
(713) 981-9595

Michael A. Maness
1900 North Loop West
Suite 500
Houston, Texas 77018
(713) 680-9922

Matt E. Rubin
6671 Southwest Freeway
Suite 303
Houston, Texas 77074
(713) 981-9595

Shelia Marie BROTHERS, Individually and as Next Friend of Minor Children, Breint Brothers, Roland Brothers, III, and Danrica Brothers; and Roland J. Brothers, Sr.,

Plaintiffs-Appellants,

v.

Johnny KLEVENHAGEN, in His Official Capacity as Sheriff of Harris County, Texas, and Harris County, Texas,

Defendants-Appellees.

No. 93-2453.

United States Court of Appeals, Fifth Circuit.

Aug. 1, 1994.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD, SMITH and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Plaintiffs appeal a summary judgment in their excessive force suit against Harris County, Texas, and its sheriff. Finding no reversible error, we affirm.

I.

On November 5, 1988, Roland Brothers, Jr., a/k/a Michael Reed, was arrested by the Jersey Village Police Department for auto theft. Brothers spent a few hours in a cell at the Jersey Village police facility. Because there were outstanding felony and misdemeanor warrants for his arrest, the Jersey Village police turned Brothers over to Harris County sheriff's deputies Barry Rizk and Robert Nichols, who transported Brothers to the Harris County Jail. They handcuffed Brothers, restrained his legs, and placed him in the rear of the sheriff's vehicle.

When they arrived at the Harris County Jail, the deputies drove into the "sallyport" area behind the jail.[1] As the deputies exited the car and proceeded to the area where they were required to check their weapons, they noticed that Brothers somehow had managed to remove the handcuffs and leg restraints and was running from the car toward the entrance to the sallyport that they had just entered. The automatic door to the sallyport entrance was in the process of coming down.

Fearing that Brothers would escape, the deputies several times shouted at him to stop. As Brothers attempted to crawl under the automatic door, the deputies drew their weapons and fired twelve times. Brothers died from gunshot wounds.

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[1] The "sallyport" is a secure area at the rear of the jail where incoming prisoners are unloaded and escorted into the building for booking.

Family members filed suit in state court pursuant to the Texas Wrongful Death Statute and 42 U.S.C. § 1983 against the county, against Johnny Klevenhagen, in his official capacity as sheriff, and against Rizk and Nichols. The defendants removed the action to federal court, and Rizk and Nichols were voluntarily dismissed by plaintiffs.

The parties filed cross-motions for summary judgment. Both deputies testified in depositions that they shot Brothers in order to prevent his escape. They knew that he was unarmed, and they had no reason to believe that he was a danger to them or anyone else. It is undisputed that the deputies acted in accordance with the official policy of the sheriff's department, based upon TEX. PENAL CODE § 9.52, which authorizes the use of deadly force to prevent escape from the jail without regard to whether the person is dangerous. In granting summary judgment for the defendants, the district court held that the evidence supported the conclusion that the force used under the circumstances was necessary to prevent Brothers's escape and was not unconstitutionally unreasonable.

[*455] II.

A.

Plaintiffs contend that the district court erred in granting summary judgment to defendants on their § 1983 claim. We review a grant of summary judgment *de novo*. *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Hanks*, 953 F.2d at 997.

We begin our determination by consulting the applicable substantive law to determine what facts and issues are material. *King v. Chide*, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-movant. *Id.* If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2554.

B.

The threshold issue in this case is which constitutional standard for excessive force applies to an individual escaping from custody during transport from one holding cell to another. The plaintiffs argue that the Fourth Amendment governs this case and that the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), compels a judgment in their favor.

In *Garner*, the Court held that the use of deadly force to prevent a felony suspect's escape was unconstitutional unless the officer had probable cause to believe that the

suspect posed a significant threat of death or serious physical injury to the officer or others. *Id.* at 3, 105 S.Ct. at 1697. The Court held a Tennessee statute unconstitutional to the extent it authorized such use of deadly force. *Id.* at 11, 105 S.Ct. at 1701. The suspect in Garner was encountered in the backyard of a house that officers were investigating for a reported burglary. The officer shot the suspect as he attempted to escape over a fence. The officer stated that he was reasonably sure that the suspect was not armed and that he shot him to prevent his escape. *Id.* at 3-4, 105 S.Ct. at 1697-1698.

The Court stated that apprehension by the use of deadly force was a seizure subject to the reasonableness requirement of the Fourth Amendment, under which a court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *Id.* at 7-8, 105 S.Ct. at 1699-1700.[2]

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[2] We note that *Garner* cited with approval the Model Penal Code, which treats prison escape attempts differently from the apprehension of suspects. *Compare* MODEL PENAL CODE § 3.07(2)(b) ("The use of deadly force [to effect an arrest] is not justifiable ... unless ... the actor believes that ... there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.") with *id.* § 3.07(3) ("[A] guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.") and *id.* § 3.07 explanatory note ("The public interest in

This argument would be persuasive had Brothers been a suspect, but at the time of his attempted escape he was in custody. A pretrial detainee receives the protection of the Due Process Clause of the Fourteenth [*456] Amendment. *Valencia v. Wiggins*, 981 F.2d 1440, 1443-45 (5th Cir.), *cert. denied*, --- U.S. ----, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993). Under *Valencia*, the appropriate inquiry is "whether the measure taken inflicted unnecessary and wanton pain and suffering" and " 'whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.' " *Id.* at 1446 (citing *Hudson v. McMillian*, --- U.S. ----, ----, 112 S.Ct. 995, 998, 117 L.Ed.2d 156 (1992)).

In *Graham v. Connor*, 490 U.S. 386, 395 n. 10, 109 S.Ct. 1865, 1871 n. 10, 104 L.Ed.2d 443 (1989), the Court stated that it "ha[d] not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins."[3] But *Valencia* is unambiguous as to when the

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prevention of escape by persons lawfully in the custody of penal institutions is regarded by the provision as sufficient to warrant the use of deadly force where the custodian or guard believes that only such force can prevent the escape."). Almost exactly the same language as that above quoted from § 3.07(3) is contained in TEX. PENAL CODE § 9.52.

[3] Plaintiffs contend that the Court reached this issue in *Albright v. Oliver*, --- U.S. ----, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). We find *Albright* inapposite for two reasons. First, *Albright* was an individual complaining of an arrest warrant and prosecution without probable cause. That

protection of the Fourth Amendment ends:

> We do not believe that the Fourth Amendment provides an appropriate constitutional basis for protecting against deliberate official uses of force occurring ... *after* the incidents of arrest are completed, *after* the plaintiff has been released from the arresting officer's custody, and *after* the plaintiff has been in detention awaiting trial for a significant period of time.

Valencia, 981 F.2d at 1443-44.

The court cited three reasons for reaching this conclusion. First, the text of the Fourth Amendment — prohibiting unreasonable "seizures" — does not support its application to a post-arrest encounter. Second, the Supreme Court has refused to apply the Fourth Amendment to protect inmates after incarceration. And third, *Graham* and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (refusing to concede that Fourth Amendment applied to pretrial detainee subjected to body cavity search), dictate that the Due Process Clause is the appropriate constitutional basis for pretrial detainee excessive force suits.

Applying the *Valencia* analysis to the facts of this case, we conclude that Brothers was a pretrial detainee.

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scenario is far different from a pretrial detainee escaping from custody. Second, that portion of *Albright* that suggests that the Fourth Amendment applies to pretrial deprivations of liberty did not receive the support of a majority of the Justices. *See id.* --- U.S. at ----, 114 S.Ct. at 813.

First, the incidents of arrest were complete. Second, Brothers was released from the arresting officer's custody. And third, Brothers already had been in detention.

Valencia indicates that the Fourth Amendment applies more appropriately to the actual incident of arrest. Although the protection may extend beyond the time of initial apprehension, *see* 981 F.2d at 1444 n. 10, Brothers had been arrested earlier in the day, had been processed by the Jersey Village Police Department, and had spent several hours in jail. He was being transported to the county jail, his hands cuffed and his legs restrained. It is difficult to imagine how Brothers could not be considered a detainee at that point. If the incident had occurred several hours earlier, while Brothers was a resident of the Jersey Village Police Department jail, he surely would have been considered a pretrial detainee. The fact that he was being transported to the Harris County jail does not change his status.

Plaintiffs argue that the apprehension of Brothers paralleled the apprehension of the suspect in *Garner*. According to this logic, however, anytime a detainee escapes, requiring re-apprehension by law enforcement officials, the Fourth Amendment comes back into play because the individual is "seized." *See id.* at 1444 ("[T]he concept of 'seizure' in the Fourth Amendment is not so capacious or elastic as to cover pretrial detention three weeks after the initial arrest....").[4]

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[4] The Fourth Amendment prohibits unreasonable seizures. Of course, shooting an escapee is a seizure; it stops his forward movement and terminates his freedom. But pretrial detainees lose many individual liberties and do not

[*457] We reject this proposition. Once an individual has been arrested and is placed into police custody, and surely after the arresting officer has transferred the individual to a jail cell, the individual becomes a pretrial detainee, protected against excessive force by the Due Process Clause. Until the detainee is released from custody, this status never reverts back to that of mere suspect.[5] Any other conclusion would lead to the anomalous result of pretrial escapees' receiving greater protection than those detainees who peacefully remain in their cells. Thus, the force used against Brothers should be judged under the Due Process Clause. *See Bender v. Brumley*, 1 F.3d 271 (5th Cir. 1993) (applying Due Process Clause analysis to pretrial detainee taken from his cell the same day as his arrest and allegedly beaten).

C.

Plaintiffs contend that even if Brothers was a pretrial detainee under *Valencia*, various Supreme Court cases dictate that the Fourth Amendment applies to searches and seizures of prisoners and pretrial detainees. In support of this position, plaintiffs rely primarily upon *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). They argue that this case, presumably applying certain Fourth Amendment protections to prisoners and pretrial detainees, justifies application of the Fourth Amendment to the seizure of an escaping pretrial detainee.

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receive the full protection of the Fourth Amendment.

[5] Of course, the pretrial detainee may eventually become an inmate, receiving the protection of the Eighth Amendment.

Plaintiffs' reliance upon *Wolfish* is unavailing. In *Wolfish*, the Court stated: "[A]ssuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a correctional facility, we nonetheless conclude that these searches do not violate that Amendment." *Wolfish*, 441 U.S. at 558, 99 S.Ct. at 1884 (citations omitted). Thus, the Court refused to concede that the Fourth Amendment applied to such inmates and concluded that no protection would be afforded even if it did apply.[6]

D.

Under the due process standard *Valencia* applies to pretrial detainees,[7] the prevention of the escape was not unconstitutional. The sheriff's department policy is designed

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[6] Plaintiffs ignore *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984), in which the Court stated: "[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Moreover, in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), the Court applied an Eighth Amendment analysis to the claim of an inmate shot by a guard during a prison riot. Thus, we can safely conclude that the Court has imposed significant limitations on the reach of the Fourth Amendment to pretrial detainees.

[7] We note that the district court incorrectly applied a Fourth Amendment analysis. Nevertheless, we may affirm summary judgment on grounds different from those stated by the district court. *See, e.g., Louisiana Land & Exploration Co. v. Amoco Prod. Co.*, 878 F.2d 852, 854 (5th Cir.1989).

"in a good faith effort to maintain or restore discipline" and not "maliciously and sadistically for the very purpose of causing harm." Brothers had been arrested for auto theft and had previously escaped from custody. The deputies shouted for Brothers to stop and only fired upon him as he ignored their warnings and crawled under the closing door. They acted quickly and decisively.

Furthermore, the county policy allows deadly force only when immediately necessary to prevent escape. It is apparent that the deputies fired at Brothers only as a last resort to prevent the escape. It is also apparent that if they had not fired upon him, Brothers would have escaped. The deputies did not act maliciously or sadistically or in an attempt to inflict punishment, but rather followed a constitutional policy that permits deadly force only when necessary to prevent an immediate escape. The plaintiffs failed to adduce summary judgment evidence to the contrary.

III.

The plaintiffs also assert that the county's failure to train its deputies concerning the constitutional limitations on the use of force [*458] amounted to deliberate indifference to constitutional rights. The plaintiffs fail to adduce any evidence of this alleged failure or its connection to the prevention of Brothers's escape.

AFFIRMED.

CARL E. STEWART, Circuit Judge, Dissenting:

I agree with the majority's conclusion that the threshold issue to be decided in this case is the standard of law that should be applied to examine pretrial excessive force claims, however I disagree with the majority's conclusion that the Due Process Clause and not the Fourth Amendment provides the applicable standard of law. The majority relies on *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993), *cert. denied*, --- U.S. ----, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993), to conclude that Brothers was not protected by the Fourth Amendment; however, I do not share my colleagues' confidence that *Valencia* is dispositive of the instant issue.

In *Valencia*, this Court held that the Due Process Clause and not the Fourth Amendment provided the applicable legal standard to adjudicate claims of excessive force. *Valencia*, 981 F.2d at 1445. However, the *Valencia* court rooted its decision primarily in the fact that the plaintiff had been in custody for *three weeks* before the disputed incident, *id.* at 1444, a fact not emphasized by the majority opinion in *Brothers*. Noting that the Supreme Court had been reluctant to extend Fourth Amendment protection beyond the initial arrest, this Court concluded that when a suspect has been in custody for an extended period of time, the Due Process Clause and not the Fourth Amendment provided the applicable constitutional standard to analyze claims of excessive force. *Id.* at 1444-45.[8] However, the crucial factor

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[8] As observed in *Valencia*, other Circuits have concluded that the Fourth Amendment standard applies to various post-arrest, pre-arraignment custodial settings. *See Valencia*, 981 F.2d at 1444, footnotes 9-12 and the accompanying text.

in the *Valencia* analysis — the extended period of time between the arrest and the challenged use of force — is absent in this case. Thus, *Valencia* does not apply to the present case where Brothers was killed shortly after his arrest.

In my view, *Albright v. Oliver*, --- U.S. ----, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) resolved the doubts expressed in *Valencia* about extending the protection of the Fourth Amendment beyond the time of arrest. In *Albright*, the petitioner claimed that his Due Process rights had been violated when the State of Illinois initiated criminal proceedings against him for committing non-criminal acts. The petitioner had surrendered himself when he learned of an outstanding warrant for his arrest, and was conditionally released after posting bond. He deliberately decided to pursue his claim before the U.S. Supreme Court only under the Due Process Clause and did not pursue a possible Fourth Amendment violation. A plurality of the Supreme Court held that his claim was governed exclusively by the Fourth Amendment and that he could *not* recover for a violation of his substantive Due Process rights. *Id.*, --- U.S. at ----, 114 S.Ct. at 813. Justice Souter concurred, but did not join, in the plurality opinion, noting that "... none of petitioner's alleged injuries has been treated by the Courts of Appeals as beyond the ambit of compensability under the general rule of 42 U.S.C. § 1983 liability for a seizure unlawful under Fourth Amendment standards ...", *Id.*, --- U.S. at ----, 114 S.Ct. at 821, and that harms such as those claimed by the petitioner "have naturally coalesced under the Fourth Amendment, since the injuries usually occur only after an arrest or other Fourth Amendment seizure ...". *Id.*, --- U.S. at ----, 114 S.Ct. at 822.

In *Albright*, the petitioner had been "seized" by his arrest and his conditional release after posting bond. Five members of the Court agreed that a Fourth Amendment analysis, and not a Due Process Clause analysis, applied to the petitioner's 42 U.S.C. § 1983 claims. *See the plurality opinion, id., along with the concurrence by Justice Souter*, --- U.S. at ---- - ----, 114 S.Ct. at 819-822. Thus, the Supreme Court has extended the protection of the Fourth Amendment beyond the time of arrest or the initial act of restraining an individual's liberty. I read *Albright* as pronouncing precisely the [*459] scope of Fourth Amendment protection that the majority denies in the instant case. As stated in *Albright, id.* --- U.S. at ----, 114 S.Ct. at 813 (emphasis added),

> The Framers considered the matter of *pretrial deprivations of liberty* and drafted the Fourth Amendment to address it.

This observation provides a greater basis for concluding that the Fourth Amendment is the applicable standard of analysis in this case than *Valencia* does for concluding that the Fourth Amendment does not apply. The concern expressed in *Valencia*, regarding whether Fourth Amendment protection extends beyond the initial arrest, has been answered by the Supreme Court in the affirmative.

In *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985) (emphasis added), the Supreme Court stated that,

> Whenever an officer restrains the freedom of a person to walk away, he has

> seized that person. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975). While it is not always clear just when minimal police interference becomes a seizure, see *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

Accordingly, the Fourth Amendment is applicable to the instant case.

Garner, id., compels a judgment in Brothers' favor regarding the constitutionality of the Harris County policy. In Garner, pursuant to a statute that allowed the use of deadly force to apprehend all felony suspects, a police officer had shot a burglary suspect as he tried to escape. The Supreme Court determined that the Tennessee statute was unconstitutional as applied to unarmed, nondangerous fleeing suspects because it violated the Fourth Amendment's prohibition against unreasonable searches and seizures. *Id.* 471 U.S. at 11, 105 S.Ct. at 1701. Accordingly, the Court held the Tennessee statute "invalid insofar as it purported to give [the officer] the authority to act as he did". *Id.* at 22, 105 S.Ct. at 1707. In so holding, the Court stated that:

> [T]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is ***constitutionally unreasonable***. It is not better that all felony

> suspects die than that they escape. Where the suspect *poses no immediate threat* to the officer and *no threat to others*, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. *Id.* at 11, 105 S.Ct. at 1701. (emphasis added).

This principle is applicable to the case before us now.

Each of the deputies stated in his deposition that they had no reason to think that Brothers would pose a threat to them or anybody else.[9] Both deputies also testified that they did not think that he was a danger to the outside community. Given the uncontradicted testimony that Brothers posed no danger beyond the risk of his escape, the Harris County policy which allowed this use of deadly force is unconstitutional as applied to Brothers because it violated the Fourth Amendment prohibition against an unreasonable seizure. Under *Tennessee v. Garner, supra*, this policy can provide no shield from liability for the defendants.

For the foregoing reasons, I respectfully dissent.

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[9] The record reflects that one of the officers considered all escapees to be dangerous and therefore considered Brothers to be dangerous because he was an escapee. When asked whether he had any reason to believe that Brothers was dangerous, he replied "No."

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHEILA MARIE BROTHERS
INDIVIDUALLY AND AS
NEXT FRIEND, ET AL.,

Plaintiffs,

VS. CA NO. H-90-3783

JOHNNY KLEVENHAGEN,
ET AL.,

Defendants.

ORDER

Pending before the Court are the cross-motions for summary judgment of the plaintiffs, Sheila Marie Brothers, et al. and the defendants, Sheriff Johnny Klevenhagen ("the Sheriff"), in his official capacity as Sheriff of Harris County, Texas and Harris County, Texas ("Harris County"). After considering the motions, the response, the record on file and the applicable law, this Court is of the opinion that the defendants' motion should be granted and the plaintiffs' motion should be denied.

FACTS

This civil rights action, filed under 42 U.S.C. § 1983, against the Sheriff and Harris County seeks damages for

alleged use of unconstitutional deadly force in the shooting death of Roland Brothers, Jr., ("Brothers") (aka Michael Reed). The plaintiffs are the surviving wife, children and father of Brothers.

On November 5, 1988, Brothers was arrested by the Jersey Village Police Department and, subsequently, turned over to Harris County sheriff detectives, Barry Rizk and Robert S. Nichols because there were outstanding felony and misdemeanor warrants for Brothers' arrest. After receiving the prisoner, the detectives placed Brothers in the back seat of the patrol car and transported him to the Harris County jail, entering through the "sallyport" entrance. The "sallyport" is a secured area inside the jail facility where incoming prisoners are unloaded. The entrance has an electric door that raises to allow vehicles to enter.

After entering, Rizk and Nichols exited the patrol car leaving Brothers in the back seat and signaled the door operator to close the door. While they were outside the patrol car, Brothers, who had removed his restraints, attempted to escape by running under the "sallyport" door as it was descending. The detectives noticed Brothers and shouted "stop" as a warning. Brothers continued his attempt to escape and was shot as he was crouching under the door. He died as a result of injuries sustained in the attempted escape.

CONTENTIONS OF THE PARTIES

In their summary judgment motion the plaintiffs contend that the shooting of Brothers constituted a deprivation of Brothers' constitutional right against unreasonable seizure, because no probable cause existed to

use deadly force. The plaintiffs assert that the detectives knew that Brothers was unarmed, and had no reason to believe that Brothers posed a threat of physical harm to them or anyone else. The plaintiffs maintain that the detectives shot Brothers solely to prevent his escape, which conduct constituted an unreasonable seizure in violation of the Constitution.

The plaintiffs further contend that Harris County is liable because: (a) this use of deadly force was pursuant to the official policy of Harris County; (b) Harris County failed to properly train the detectives about the constitutional limitations upon the use of deadly force; and (c) Brothers' right to "due process" of law was violated by the use of deadly force against him.

In their summary judgment motion, the Sheriff and Harris County contend that the shooting of Brothers did not deprive Brothers of any constitutional rights because the detectives' conduct was reasonable and sanctioned under Texas law. They assert that Texas law permits the use of deadly force to prevent an escape when the officers believe that it is immediately necessary to prevent a prisoner from escaping custody. They also maintain that Brothers was not unreasonably seized because at the time of his apprehension, he was a pretrial detainee and a convicted prisoner attempting to escape. In this circumstance, they contend, deadly force is justified. Finally, they assert that the detectives had no way of knowing that Brothers was not dangerous to the public because he was using an alias (Michael Reed), had an outstanding felony warrant for his arrest, and would have successfully escaped had the detectives not taken swift action.

DISCUSSION AND AUTHORITIES

Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Prevailing on an excessive force claim under § 1983 requires proof that the claimant sustained a significant injury that resulted directly and only from the use of force that was clearly excessive to the need, which excessiveness was objectively unreasonable. *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (en banc). A county government is liable for the deprivation of rights protected by the Constitution or federal laws when the deprivation is a result of official policy. The policy or custom must, however, be the moving force behind the constitutional violation. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). A pretrial detainee is an individual who has been charged with a crime but who has yet to be tried on the charge. *Bell v. Wolfish*, 441 U.S.520, 523 (1979).

SUMMARY JUDGEMENT

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The movant bears the exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. *Impossible Elecs. Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026 (5th Cir. 1982); *see Celotex v. Catrett*, 477 U.S. 317 (1986).

In assessing whether the movant has met this burden, the Court should view the evidence introduced and all factual inferences in the light most favorable to the party opposing the motion. *Impossible*, 669 F.2d at 1031. Further, the standards upon which this Court evaluates motions for summary judgment do not change simply because the parties present cross-motions. *Taft Broadcasting v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991).

It is undisputed that in a § 1983 excessive force claim the question is whether the amount of force was "clearly excessive" and "objectively unreasonable." The "reasonableness" of the officers' actions are examined in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Graham v. Conner*, 490 U.S.386, 397 (1989). Thus, where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. *Garner*, 471 U.S. at 11-12. The basis for Harris County's policy is found in the state statutes.

Section 9.52 of the Texas Penal Code provides in part:

> [A] peace officer is justified in using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

Tex. Penal Code §9.52 Vernon's Annotated 19__).

In reviewing the summary judgment evidence, the Court starts with the premise that the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances is constitutionally unreasonable. *Garner*, 471 U.S. at 11. However, the reasonableness of a particular use of force requires careful attention to the facts and circumstances and must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight. *Graham*, 490 U.S. at 396-397.

The plaintiffs rely heavily on *Garner* as support for their claim that probable cause must exist before police officers use deadly force to prevent an escape. In *Garner*, a felony suspect fled to avoid custody. The police officers called to the scene, shot and killed the suspect as he was fleeing. However, the police officers lacked probable cause to believe that the suspect posed a danger. *Id.* at 3.

This case, however, is distinguishable. Brothers was not fleeing to avoid custody at the time he was shot. Brothers was already in custody. Brothers had been captured, arrested and taken to jail before he sought to escape. Interestingly, both parties characterize Brothers as a pretrial detainee at the time of the shooting, not a fleeing suspect.

Unquestionably, Harris County's deadly force policy incorporates Texas law. The plaintiffs cite to no case, nor has this Court located one, that declares the Texas Penal Code §9.52 unconstitutional. They point to no provisions in Harris County's policy that could be construed as authorizing a sheriffs deputy to use deadly force unnecessarily or

unjustifiably.

The Sheriff and Harris County proffer uncontradicted evidence that the detectives believed that the force used was immediately necessary to prevent Brothers' escape. First, Brothers was a fugitive, having previously escaped while in custody. Moreover, it is uncontroverted that Brothers failed to heed halt warnings and that he was crawling under a closing sallyport door at the time he was shot.

This evidence supports a reasonable conclusion that the force used under the circumstance was necessary to prevent his escape. More important is the conclusion that the deadly force used was not constitutionally unreasonable. The calculus of whether the force used was reasonable must embody allowances for the fact that police officers must make split second decisions. *Graham*, 490 U.S. at 397.

The plaintiffs have failed to meet the necessary burden of demonstrating that there is no dispute as to any material fact. The defendants have demonstrated that there is no material fact in dispute. Accordingly, the plaintiffs' motion for summary judgment is DENIED and the defendants' motion for summary judgment is GRANTED.

Signed this 22nd day of April, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHEILA MARIE BROTHERS
INDIVIDUALLY AND AS
NEXT FRIEND, ET AL.,

Plaintiffs,

VS. CA NO. H-90-3783

JOHNNY KLEVENHAGEN,
ET AL.,

Defendants.

FINAL JUDGMENT

The plaintiffs shall take nothing by their suit.

This is a FINAL JUDGMENT.

Signed this 22nd day of April, 1993.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE